

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 164 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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DISTRICT EDUCATION COMMITTEE

Versus

SIRISHKUMAR KANTILAL DAVE

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Appearance:

MS SEJAL K MANDAVIA for Petitioner

MR RD DAVE for Respondent No. 1

MS KN VALIKARIMWALA,AGP for Respondent No. 2

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 28/04/97

ORAL JUDGEMENT

1. This appeal which is filed under Section 100 of the Code of Civil Procedure, 1908, has arisen from the suit brought by respondent No.1 against the appellant and respondent No.2 for declaration that he is entitled to be appointed on compassionate grounds on class-III post on death of his father and for permanent injunction

restraining the appellant and respondent No.2 from appointing any other person on the post in question.

2. The name of the father of respondent No.1 was Kantilal Damodar Dave. The father of respondent No.1 was serving as Principal in Government School at village Dhanapipli. The father of respondent No.1 expired on December 5, 1981 in harness as he was suffering from cancer. The respondent No.1 has passed S.S.C.examination. As he was qualified to be appointed on class-III post on compassionate ground, he made application claiming appointment on compassionate ground. The application submitted by the respondent No.1 was rejected by the appellant. Under the circumstances, the respondent No.1 instituted Regular Civil Suit No.535 of 1990 in the court of learned Civil Judge ( S.D. ), at Junagadh and claimed declaration that he was entitled to be appointed on compassionate ground on class-III post with effect from December 5, 1981. He also prayed to issue perpetual injunction restraining the defendants from making any sort of appointment or recruitment in respect of class-III post till he was duly appointed on the said post.

3. The defendant No.1 i.e. State of Gujarat contested the suit by filing written statement at Exh.13. No written statement was filed by the present appellant. In the written statement it was inter alia contended that the suit filed without giving notice under Section 80 of the Code of Civil Procedure was not maintainable and liable to be dismissed. It was pleaded therein that as the monthly income of the dependants of deceased Kantilal Damodar Dave was more than the prescribed limit, the government had not accepted the application submitted by the respondent No.1 claiming appointment on compassionate ground, and, therefore, the respondent No.1 was not entitled to have the reliefs claimed in the plaint. By filing written statement, the defendants No.1 demanded dismissal of the suit.

4. Having regard to the pleadings of the parties, the trial court framed 5 issues for determination vide Exh.15. The respondent No.1 examined himself at Exh.19 to prove the case pleaded in the plaint. However, the respondent No.1 was not cross examined by the original defendants nor any evidence was adduced on behalf of the defendants. The respondent No.1 also produced the documentary evidence in support of his case. On appreciation of evidence, the trial court held that respondent No.1 proved that his father late Mr. Kantilal Damodar Dave was serving as a teacher in Government

School and expired on December 5, 1981, while he was in service. The trial court further deduced that decision of the State of Gujarat rejecting prayer of the respondent No.1 to appoint him on compassionate ground is illegal and void as income of the dependants of Kantilal Damodar Dave did not exceed the limit prescribed by the Government. The trial court found that the respondent No.1 was entitled to get employment on compassionate ground. In view of these conclusions, the trial court partly decreed the suit by judgment and order dated December 21, 1995. The trial court directed the defendants to give suitable appointment to the respondent No.1 on compassionate ground as per his qualification on class-III government post as per the pay-scale admissible under the relevant rules within 30 days. The trial court further directed that if no post was available, then the defendants should create a supernumerary post to comply with the directions given by it.

5. Feeling aggrieved by the abovereferred to decree the appellant preferred Regular Civil Appeal No.49 of 1996 in the District Court at Junagadh. The learned 2nd Extra Assistant Judge, Junagadh, who heard the appeal has dismissed the same by judgment and decree dated September 26, 1996, giving rise to the present appeal.

6. At the time of admitting Second Appeal, the court has formulated the following substantial questions of law for determination.

- "1. Whether the Civil Court while directing  
compassionate appointment of an applicant  
within the frame work of the state policy  
in this regard, can direct creation of a  
supernumerary post in order to  
accommodate the applicant ?
2. Whether on the facts and circumstances of  
the case, the impugned judgment and  
decree of the lower appellate court  
confirming that of the lower court is in  
accordance with law ? "

7. Before answering substantial questions of law, it would be advantageous to recapitulate the admitted facts. The father of the respondent No.1 was serving as a Principal in the school run by the District Education Committee, Junagadh District Panchayat, Junagadh. The father of the respondent No.1 expired on December 5, 1981, while in service. The respondent No.1 had thereafter made an application seeking appointment on compassionate ground. The application submitted by

respondent No.1 was rejected by the State Government on the ground that the total income of the dependents of deceased Kantilal Damodar Dave was in excess of the limit prescribed by the State Government. The evidence of the respondent No.1 was not challenged by any of the defendants at all. The defendants had not applied to the court of first instance for permitting any of them to cross-examine the respondent No.1. Under the circumstances, the evidence of the respondent No.1 adduced before the court of first instance remained unchallenged. No officer was examined by any of the defendants at all. Having regard to the oral and documentary evidence led by the respondents, the court of first instance as well as the first appellate court which is final court of facts have held that the income of the family members of deceased Kantilal Damodar Dave did not exceed Rs.600/= per month which was prescribed by the State Government. The finding that income of the family members of deceased Kantilal Damodar Dave did not exceed the limit prescribed by the State Government is a pure finding of fact and not of law. While reaching the said finding, the first appellate court has noticed and observed that no evidence worth the name was produced by any of the defendants to establish that younger brother of the respondent No.1 was working in Mid-day-meal Scheme and getting Rs.200/= per month when respondent No.1 had applied for getting appointment on compassionate ground. As the evidence led by the respondent No.1 was not challenged at all, it cannot be said that any error is committed by fact finding courts in holding that the income of the family members of deceased Kantilal Damodar Dave did not exceed the prescribed limit. The finding that the income of the family members of deceased Kantilal Damodar Dave did not exceed Rs.600/- per month is based on proper appreciation of evidence and as it is not pointed out that the same is erroneous in any manner, it is hereby upheld. Under the circumstances, there is no manner of doubt that the respondent No.1 was entitled to declaration that he is entitled to get the appointment on class-III post on compassionate ground.

8. However, the trial court was not justified in directing the defendants to give suitable appointment to the respondent NO.1 on compassionate ground within 30 days from the date of judgment nor the trial court was justified in directing the defendants to create a supernumerary post to comply with the directions contained in the judgment if post was not available. The Supreme Court in the case of State of Haryana v. Nareshkumar Bali (1994) 4, Supreme Court Cases, 448, has held that High Court can only direct consideration of the

writ petitioner's claim to compassionate appointment in accordance with the rules and it cannot itself direct the appointment. In the said case the High Court while exercising powers under Article 226 of the Constitution had issued a direction to appoint the respondent within 3 months when direct recruitment was not available. The Supreme Court has restated the law on the subject and held that the High Court could have merely directed consideration of the claim of the respondent in accordance with rules, but direction to appoint the respondent within 3 months did not fall within scope of mandamus. After emphasizing that judicial review is directed against the decision making process and not against the decision itself it has been held that it is no part of the court's duty to exercise the power of the authorities themselves. In the light of abovereferred to principle, I am of the opinion that the trial court was not justified in directing the defendants to give suitable appointment to the respondent No.1 on compassionate ground on class- III post as government servant and that too within three months. Therefore, the said direction cannot be sustained and will have to be modified by a suitable direction.

9. Similarly the direction given to the original defendants to create supernumerary post to enable them to comply the direction issued in the judgment also cannot be sustained. The Supreme Court in the case of State of Haryana and others v. Piara Singh and others, A.I.R., 1992, S.C. 2130 has held that the creation and abolition of a post is the prerogative of the executive. On the facts and in the circumstances of the case, I am of the view that the trial court was not justified in directing the defendants to create a supernumerary post in order to enable them to comply with decree passed by it.

10. In view of the above discussion, first substantial question of law is answered in negative and against the respondent No.1. Similarly, the appellate court while confirming decree of the trial court was not justified at all in confirming direction to the defendants to appoint the respondent No.1 on class-III post as government servant within 30 days or the direction to the defendants to create supernumerary post so as to enable them to comply with the decree passed against them. The only direction which could have been given to the defendants was to consider the claim of the respondent NO.1 for compassionate appointment in accordance with the findings recorded by the trial court.

11. For the foregoing reasons the Second Appeal

partly succeeds. The direction given to the original defendants to appoint the respondent No.1 on compassionate ground on class-III post within 30 days is hereby set aside and quashed. Similarly, the direction given by the trial court as confirmed by the first appellate court to the defendants to create a supernumerary post to enable them to comply with the decree passed by the trial court is also hereby set aside. Instead the defendants are hereby directed to consider the claim of the respondent No.1 for appointment on compassionate ground in light of the findings recorded by the fact finding courts as early as possible and preferably within three months from today. Having regard to the facts of the case, there shall be no order as to cost. In case of difficulty it will be open to the respondent to approach the court. D.S. permitted.

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